IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942.

No. 1024

HARRY BECKER,

Petitioner,

vs.

LOEW'S, INCORPORATED, A DELAWARE CORPORATION,

Respondent.

Reply Brief for Petitioner.

Respondent's brief makes practically no attempt to meet the reasons advanced by petitioner for the allowance of the writ of certiorari. Respondent's brief is devoted in the main to questions of fact which are not involved in a petition for certiorari.

The categorical statement (Rspt's. Brief, p. 2), that the Circuit Court of Appeals "concisely and correctly summarizes the book and picture," followed by a quotation from the opinion, is an example of such argument on facts. The quotation itself belies the statement, for the Circuit Court of Appeals does not purport to recite the passages claimed to be infringed but is expressly limited to a *four line* quotation from *one* of such passages. On the other hand, the part of the picture which is described

is not the basis for the claim of infringement. Should certiorari be granted herein, petitioner will show that the evidence amply supports the findings of the Master and District Court of infringement by dramatization, and that the Circuit Court of Appeals erred by applying principles of law not applicable to the case at bar.

That the Circuit Court of Appeals reversed the lower court because of a divergent view of the law is apparent from the following statement:

> "* * * yet where the ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact, as it is in this case, it is subject to judicial review" (R. 321).

Reasons Relied On For Allowance of Writ.

The brief of respondent leaves completely unanswered the reasons advanced in the petition for the allowance of the writ (Pet. pp. 7-8), namely, that the construction of Section 1b of the Copyright Act, granting to copyright holders the exclusive right to dramatize their works, and Section 4, which extends such protection to *all of the writings* of an author (*e. g.*, the title), present important questions of federal law which have not been but should be decided by this Court; and that interference with the exclusive right to dramatize is protected under the law of unfair competition. These reasons come directly within the suggestions contained in Rule 38, Subdivision 5 (b) of this Court.

Points I and II of respondent's brief (pp. 5-7) are entirely devoted to a discussion of facts. An example is the statement that "Whitbeck had never heard of plaintiff's book until after he suggested the title," (Rspt's. Brief, p. 6) followed by a reference to the opinion at R. 315. The statement, however, is inaccurate for the

opinion merely states that Whitbeck had *so testified.* The Master and the District Court found, however, that Whitbeck had testified falsely to a material fact (R. 266) and nowhere in the opinion of the Circuit Court of Appeals is this finding criticized.

The question of access and independent conception argued by respondent (Rspt's. Brief, pp. 6-8), are also questions of fact. The District Court found as a matter of law that "access and copying may be proved by circumstantial evidence and may be inferred from a comparison of the two works" (R. 273 (10)) and no dissent from this conclusion appears in the opinion of the Circuit Court of Appeals.

We do not understand that it is a practice of this Court to determine questions of fact upon a petition for certiorari and we are not prepared to deviate from this practice by burdening the Court at this time with such a discussion. Suffice it to say, that two successive tribunals, the Master and the District Court, after thorough hearings and review found that defendant was guilty of infringement.

Protection of Title Under the Coppright Law.

Respondent in its brief (p. 8), denies as a matter of law that titles are protected by copyright. The petition herein requests this Court to settle this very question of law, never yet determined by this Court. The above grounds urged by petitioner upon this Court as a basis for granting the petition for certiorari are in no wise answered in respondent's brief.

The Exclusive Right of Dramatization.

Respondent in its brief at page 10, states "* * * petitioner contends that the right to dramatize is broader than any other right under the Copyright Statute and

gives him a monopoly of general thoughts, ideas and theories contained in his book, which, except for his claim under the right to dramatize, would not otherwise be protected by the statute." No such monopoly was sought. Plaintiff's claim is founded on the dramatization by the defendant of his combination of ideas, together with the appropriation of his identical title. These are properly the subject of copyright protection.

However, if Section 1b of the Copyright Act was not enacted for the purpose of protecting that which "would not otherwise be protected by statute," then its passage was an unnecessary gesture. It is precisely because Congress intended to create and protect the broader right of dramatization that it added Section 1b to the Act. One of the reasons for filing the petition for certiorari herein is to determine the scope of this protection. The question is one of great importance to authors and the public generally and this is not denied in respondent's brief.

None of the Supreme Court cases cited by respondent in its brief (p. 10) discuss the question involved herein.

The citation in Point V of respondent's brief (p. 11) from *Dam* v. *Kirk La Shelle Co.*, 175 F. 902, is not applicable herein. The case of *Dam* v. *Kirk La Shelle Co.*, 175 F. 902, was cited by petitioner to show the diametrically opposed views taken by the two Circuit Courts of Appeal in considering the changes inherent in dramatization, in making the comparisons involved (Petitioner's Brief, pp. 11-15).

Unfair Competition.

In Points VI and VII of its brief (pp. 11-12), respondent urges that secondary meaning was not proved for plaintiff's title. Such proof was unnecessary (Pet. Brief, pp.

22, 23). (However, secondary meaning was proved and the Court so found. R. 271 (19).) What petitioner urges in his brief is that the exclusive right to dramatize subsists for the life of the copyright and is entitled to protection from unfair competition (Petitioner's Brief, pp. 21-23). No attempt was made by respondent to meet this issue and none of the cases cited by it discuss unfair competition from the viewpoint of the right of dramatization.

CONCLUSION.

It is respectfully submitted, therefore, that for the reasons urged in the petition, the writ of certiorari should be allowed by this Honorable Court.

Respectfully submitted,

MOSES LEVITAN,
Counsel for Petitioner.